United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

478

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23316

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION
750 Third Avenue
New York, New York

A New York Corporation

and

THE EVENING STAR NEWSPAPER COMPANY
225 Virginia Avenue, S. E.
Washington, D. C.

A District of Columbia Corporation

vs.

CLIFFORD L. ALEXANDER, JR. et al as Members of the Equal Employment Opportunity Commission,

and

WOMEN'S EQUITY ACTION LEAGUE (WEAL)

Appellants

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

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TABLE OF CASES

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STATUTES

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

This case is concerned with newspapers and their classified "help-wanted" advertising policies, an area of law which has not been judicially reviewed.

Working women, regardless of their ability, training, or aspirations, are being forced into an economic ghetto of very limited circumference. The lower limit is poverty, and a non-living wage. A very high percentage of women who work full-time live at this level. The upper boundaries of opportunity and upward mobility for working women are so limited that less than one percent of the women in this country earn salaries of $10,000 per year or more.

Obviously many highly-qualified women, of great potential, are working for a fraction of their economic productive worth. Obviously many working women are existing under severe economic disadvantages and hardships.

The keystone of this iniquitous and wasteful situation, which is growing worse instead of better as economic and competitive pressures increase, is the newspapers. By their continued flouting of the clear requirements of Section 704 (b) of Title VII of the Civil Rights Act of 1964, they continue to advertise jobs under male and female categories, thus stripping women of their right to upgrade themselves by applying for work for which they are qualified. Women are deterred and barred by this "men only" labelling, even from presenting their qualifications.

The losses to individuals and to our economy are as enormous as they are incalculable, and the problem is a difficult one to force

into judicial review and correction.

In the instant case, an organization representing the newspapers has come into court challenging the Guideline on help-wanted advertising issued by the Equal Employment Opportunity Commission, the agency charged with enforcement of this federal statute. While making a plea for equitable relief, the newspapers have sought to limit the issues of the action to the enforcement entitlements of the agency.

It is the contention of the Women's Equity Action League (WEAL) that the newspapers have thus subjected themselves to judicial review with regard to the whole res of this action, the res being help-wanted advertising.

It is the contention of these appellants, hereinafter known as WEAL, that the newspapers have thus subjected themselves to judicial inquiry as to the equitability of their own position with respect to the res or chose in action, inasmuch as, as they appear before the Court, they continue to aid and abet the violation of Section 704 (b) of Title VII of the Civil Rights Act of 1964, the statute the enforcement of which is at issue.

It is the contention of these appellants, WEAL, that because of the magnitude of the economic issues involved, working women and their representatives, the intended beneficiaries of this federal statute, are entitled to intervene and to show the extent of their injuries in this res, which far outweigh those of plaintiff newspapers, and which are not shared either in nature or magnitude by the original defendant, the government agency which is the sole defendant in the action as it now stands.

Appellants, WEAL, therefore believe that they have a right to a broad consideration of the facts and issues in this case, by the Court, and that this would serve the interests both of judicial convenience and of justice.

The questions presented by this appeal therefore are:

1. Whether appellants, WEAL, who are a nonprofit corporation having as its purpose the improvement of employment opportunities for women, had, as a matter of law, a right to intervene under Rule 24 (a) Fed. Rul. Civ. Proc. in the instant case,

2. Whether the District Court abused its discretion in refusing appellants intervention under Rule 24 (b) Fed. Rul. Civ. Proc.,

3. Whether the lower court committed reversible error in denying these appellants the right to intervene.

PREVIOUS APPEAL

This case was previously appealed on other issues, under the same title, having the Appellate Case Number 22519.

REFERENCES TO RULINGS

Recommendation of the Pretrial Examiner of the United States District Court for the District of Columbia, dated May 1, 1969, recommending that the motion of WEAL to intervene as a defendant and to file a counterclaim be denied.....Appendix Pages 81 and 82

Order of Court denying appellants Motion to Intervene, dated June 4, 1969,.....Appendix Page 105

BRIEF FOR APPELLANTS

STATEMENT OF THE CASE

JURISDICTIONAL STATEMENT:

This appeal arises under the provisions of Title 28 U.S.C. §1292 and §1294, on appeal from the order of the United States District Court for the District of Columbia, entered June 4, 1969, in the above-captioned cause, designated Civil Action No. 2431-68, denying the motion of the Women's Equity Action League (WEAL) an Ohio Corporation, hereinafter known as WEAL, to intervene under the provisions of either Rule 24 (a) or (b) of the Federal Rules of Civil Procedure. A Notice of Appeal, as provided in Rule 4, F.R.C.P. was filed in June 26, 1969.

NATURE AND COURSE OF THE PROCEEDINGS:

May it please the Court, this is an appeal from the United States District Court for the District of Columbia, which denied a Motion to Intervene filed by these appellants in the instant case. These appellants, WEAL, are an organization of working women, a number of whom are residents of the District of Columbia, which sought to intervene to represent working women, as a class, since working women are the intended beneficiaries of the provisions of the federal statute which are the res of this action, and since the corporate purpose clause of WEAL [1] places upon us a responsibility to proceed in cases concerned

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1. Corporate Purpose Clause of Women's Equity Action League (WEAL): The purpose or purposes for which said corporation is formed are: to promote greater economic progress on the part of American women, to press for full enforcement of existing antidiscriminatory laws in behalf of women, to seek correction of de facto discrimination against women, to gather and disseminate information and educational materials, to investigate

with discriminations against women.

HISTORY OF THE CASE:

The original action in this matter was filed by the American Newspaper Publishers Association, a New York Corporation, and the Evening Star Newspaper Company, a District of Columbia corporation, hereinafter known as the newspapers, against the Commissioners of the Equal Employment Opportunity Commission, hereinafter known as the Commission, in a complaint seeking injunctive and declaratory relief with regard to a Guideline[2] issued by the Commission for enforcement of Section 704(b)[3]

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instances of, and seek solutions to, economic, educational, tax and employment problems affecting women, to urge that girls be prepared to enter more advanced career fields, to seek reappraisal of federal, state and local laws and practices limiting women's employment opportunities, to combat by all lawful means, job discriminations against women in the pay, promotional or advancement policies of governmental or private employers, to seek the cooperation and coordination of all American women, individually or as organizations to attain these objectives, whether through legislation, litigation or other means, and doing any and all things necessary or incident thereto. Filed as of November 1, 1968, with the Secretary of State of Ohio.

2. Part 1604 -- Guidelines on Discrimination Because of Sex ** § 1604.4 Job Opportunities Advertising. It is a violation of Title VII for a help-wanted advertisement to indicate a preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job involved. The placement of advertisements in columns headed "male" or "female", will be considered an expression of a preference, limitation, specification, or discrimination based on sex. 33 Fed. Reg. 11539 (August 14, 1968)

3. Section 704 (b) It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to any classification or referrel for employment by such an employment agency, indicating any preference, limitation, specification or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification for employment. 42 U.S.C. § 2000e Public Law 88-352, July 2, 1964.

of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, with regard to categorization of "help-wanted" advertising by "male" and "female" designations.

The newspapers asked the court to declare that the Guideline does not have the force and effect of law, to declare the Guideline unauthorized and invalid, and to enjoin the defendants from making such Guideline effective. The newspapers centered their pleas on Section 713 (a) and (b)[4] of Title VII of the Civil Rights Act of 1964.

The District Court, in its Findings of Fact and Conclusions of Law, found the Guideline not to have the force and effect of law, but rather to be permissive and interpretive of the law, and thus within the power of the Commission to issue. (A39-46)

This finding of the District Court was appealed by the newspapers to the Court of Appeals for the District of Columbia Circuit,

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4. Section 713 (a) The Commission shall have authority from time to time to issue, amend, or rescind suitable procedural regulations to carry out the provisions of this title. Regulations issued under this action shall be in conformity with the standards and limitations of the Administrative Procedure Act.
(b) In any action or proceeding based on any alleged unlawful employment practice, no person shall be subject to any liability or punishment for or on account of (1) the commission by such person of an unlawful employment practice if he pleads and proves that the act or omission complained of was in good faith, in conformity with, and in reliance on, any written interpretation or opinion of the Commission, or (2) the failure of such person to publish and file any information required by any provision of this title if he pleads and proves that he failed to publish and file such information in good faith, in conformity with the instructions of the Commission issued under this title regarding the filing of such information. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that (A) after such act or omission, such interpretation or opinion is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect, or (B) after publishing or filing the description and annual reports, such publication or filing is determined by judicial authority not to be in conformity with the requirements of this title. 42 U.S.C. § 2000e Public Law 88-352, July 2, 1964.

with regard to a denial by the District Court of a preliminary injunction, and the motion to vacate the stay of the effective date of the Guideline.

The Appellate Court denied the motion for reversal, and vacated the stay, and remanded the case for trial on its merits. (A47-50)

The newspapers' Amended Complaint as it now stands (A 6-15) seeks judgment (1) declaring the Commission's Guideline here attacked does not have the force and effect of law, (2) declaring that any such guideline is unauthorized and invalid under Title VII of the Civil Rights Act of 1964 (Sec. 713 (b) of the Act) and (3) permanently enjoining defendant Commission from making said guideline effective on the ground that its mere existence injures plaintiffs. (A 81-82).

At this point WEAL filed a Motion to Intervene, in behalf of working women, as a class, with an Answer and Cross-Petition, alleging that working women, the intended beneficiaries of the provisions of Title VII of the Civil Rights Act, the federal statute which is the res of this action, are, in fact, the injured parties with relation to the issues presently before the court, insofar as conformity with this Statute is concerned.

The Commission entered an appearance and a reply stating that it had no objection to the inclusion of WEAL as a co-defendant (A-79), and after submission of briefs by both the newspapers (A 73-77) and the movants to intervene (A 59-72 and A 90-104) and an oral hearing before both the pretrial examiner and the Court (A Transcript at Z-1 et seq) the Motion to Intervene was denied (A 105).

It is from this order that appeal is sought.

STATEMENT OF FACTS

The Evening Star Newspaper of the District of Columbia is presently categorizing its help-wanted advertising under "male" and "female" headings. The American Newspaper Publishers Association has a membership consisting of, and it presumably represents, "more than 1000 daily newspaper (sic) which represent more than ninety (90) percent of the total daily and Sunday newspaper circulation in the United States" (A 11). No significant number of the newspapers throughout the country are conforming to the provisions of Section 704 (b) or the Guideline issued by the Commission, which is now in full force and effect under the Appellate Court's refusal to reverse (A 49) the District Court's denial of a preliminary injunction (A 46) which accordingly vacated the stay of effective date of the Guideline, therefore restoring it to full force and effect on January 24, 1969.

The working women of this country search for job opportunities in the "help wanted" columns of their various newspapers, and employers and employment agencies advertise the jobs which are available in these columns.

The newspapers derive a significant portion of their revenue from payments of employers and employment agencies for space in their help-wanted columns. The newspapers do not place such advertisements without charge, as a matter of public interest or "news", but rather as paid functionaries or agents of the employers and employment agencies.

ARGUMENT

If the substantive provisions of a Federal Statute, and the provisions for its enforcement, are considered, as a practical matter, to be closely enough interconnected to constitute the res of an action, or as the chose in action, then the res, or the chose, of the within action is the categorization of help wanted advertising into male and female designations. The newspapers have brought their action solely with regard to the categorization of help-wanted advertising into "male" and "female" categories by bringing their action solely against the "Guideline on Discrimination Because of Sex", (A 2-4, A 7-8, and A 10,11, 12, 14), which is the enforcement provision, directing their objections strictly toward its enforcement of Section 704 (b), which is the section with regard to help-wanted advertising.[5] They have thus brought the provisions regarding "help-wanted" advertising appearing in Section 704 (b) into the purview of the Court in this action, and have thus constituted it as a portion of the res of this action, or the chose in action of the controversy.

This being the case, it is legally permissible to consider the status of the newspapers from an equity standpoint, with relation to their own acts, which are doing irreparable harm to working women, whom appellants WEAL seek to represent before the Court. These acts occur within the res of the action which plaintiff newspapers have brought before the Court: namely, the newspapers aid and abet the violation of this same statute which they have brought before the Court

5. Section 704 (b) of Title VII of the Civil Rights Act of 1964 supra.

by accepting advertising which is prohibited under its terms. Regardless of the provisions of the Guideline, the Statute stands; regardless of the entitlements of the Commission, the Statute stands, and the newspapers stand before the Court as violators of this Statute.

Judicial consideration is especially opened to possibility in this action, since the newspapers have made several prayers for equitable relief (A 5, A 14,15).

A prayer for equitable relief ordinarily "opens the door to equity" [6] (A 66) and to a review of the pleaders' own equitable position[7], thus permitting counter-complaints based on equity grounds to be brought against the equity pleader.[8]

As these appellants WEAL, pointed out in their Answer (A 57, 58), their Motion (A 63), their Brief (A 65,66) and their Supplementary Brief (A 92-94), the newspapers are extremely vulnerable on equity grounds.

WEAL seeks to represent working women (A 59,60) as a class,[9] since this is the stated purpose of our non-profit corporation, and since working women are the intended beneficiaries of the provisions of the Federal Statute which is the basis of this action. No other parties

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6. Precision Instrument Mfg. Co. v Automotive Maintenance Machinery Co., 324 U.S. 806, 89 L. ed 1381, 65 S. Ct. 993
7. Some Thoughts on Intervention before Courts, Agencies and Arbitrators by David L. Shapiro, Professor of Law, 81 Harvard Law Review 721, February, 1968
8. Ford Motor Co. v. Bisanz Bros., 249 F. 2d 22 (8th Circuit, 1957)
9. Hansberry v. Lee, 311 U.S. 286, 7 L ed. 798, 54 S. Ct. 399, followed many times; Textile Workers Union v. Allendale Co., 226 F. 2d 765, 96 U.S. App. D.C. 401, cert den. 1956, 76 S. Ct. 699, 100 L.ed 1444, Supreme Tribe, B.H. v. Cauble 255 U.S. 356, 65 L. ed 673, 41 S. Ct. 338, Plumb v. Goodnow, 123 U.S. 560, 31 L. ed 268, 8 S. Ct. 216, Smith v. Swarmstedt, 16 How (U.S.) 288, 303, 14 L. ed 942,948.

have sought to intervene in behalf of the interests of working women in this action.

WEAL, the appellants, seek to intervene in the within action for the following reasons:

1. The interested and affected parties would thus all come before the Court at one time for adjudication of their respective rights, obligations and equitable entitlements. [10] (A 61, citing Rule 23 (a) and (b) Fed. Rul. Civ. Proc.) As the Court in the Atlantis case observed:

> On the one hand there is the private suitor's interests in having his own lawsuit subject to no one's direction or meddling. On the other hand, however, is the great public interest, especially in these explosive days of ever increasing dockets, of having a disposition at a single time of as much of the controversy to as many of the parties as is fairly possible consistent with due process.
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> Atlantis Development Corp. v. U.S. supra

2. The Court already has jurisdiction of a substantial number of complainant newspapers, through the American Newspaper Publishers Association as their representative (A 11) and of the Equal Employment Opportunity Commission through its Commissioners (A 1, A 6,7), and the appearance of an intervenor to represent the actual intended beneficiaries of the Statute would permit complete adjudication (A 61,62,64,66)[11]

3. A multiplicity of legal actions of various kinds will re-

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10. Atlantis Development Corp. v. U.S., 279 F. 2d 818, 5th Cir (1967) see also Hansberry v. Lee, 311 U.S. 32, 85 L. ed 22, 61 S. Ct. 115, 132 A.L.R. 741, Supreme Tribe, supra, Plumb v. Goodnow, Supra, Smith v. Swarmstedt, supra.

11. Gregory v. Stetson, 133 U.S. 579, 33 L. ed 792, 10 S. Ct. 422, Horn v. Lockhart, 17 Wall (U.S.)570, 21 L. ed 657, 39 Am. Jur. 902-903, citing Gardner v. Samuels, 116 Cal. 84, etc., citing R. C. L.

sult if the res of this matter is not adjudicated with relation to the rights of all parties concerned, and the "help-wanted" issue clarified.[12] (A 64, 103)

4. These appellants, WEAL, have suffered, are suffering, and will continue to suffer irreparable injury by reason of the acts of the newspapers with regard to help-wanted advertising, which is the chose in action (A 69,70,94) since the jobs advertised in the "female" category are almost invariably fewer in number, lower paid, and more limited in scope and opportunity for advancement.

As Congresswoman Martha Griffiths remarked in a speech before the House of Representatives with regard to the help-wanted issue:

> The inevitable consequence of putting the (help wanted) ad in the "male" or "female" column is to cut off at the outset any further reading of the ads under that label by persons of the opposite sex.
>
> The sex headings over job ads constitute a direct violation...sanction of these headings as a device to evade the law is nothing short of a disregard for the law and a total insensitivity to the adverse effects which these headings exert on equal job opportunity.[13]

5. These acts consist of the newspapers' aiding and abetting the violation, by employment agencies and by advertising employers, of the specific provisions of Section 704 (b) of the Civil Rights Act of 1964, previously cited.

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12. Ala. v. Ariz., 291 U.S. 286, 7 L. ed. 798, 54 S. Ct. 399, followed many times; Textile Workers Union v. Allendale, supra, at (8)

13. Remarks by Congresswoman Martha Griffiths: "Women are Being Deprived of Legal Rights by the Equal Opportunity Commission," Congressional Record, June 20, 1966, page 3, see also Miltensberger v. Logansport, C. & S.W.R. Co., 106 U.S. 286, 385, 27 L. ed 117, 125, 1 S. Ct. 140, followed many times, and Texas & P. R. Co. v. Marshall, 136 U.S. 393, 34 L. ed 10 S. Ct. 846, followed many times

6. Such aiding and abetting of the violation of a Federal Statute makes the newspapers equally chargeable with their principals as violators of the Federal Statute which is the res of this action, since they are acting as the paid agents of these principals (A 93-95).

> One who...advises, encourages, procures...aids or abets a wrongful act by another has been regarded as being as responsible as the one who commits the act, so as to impose liability upon the former to the same extent as if he had performed the act himself. The liability in such case is joint and several.[14]
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> 52 Am. Jur, Torts § 113

7. Plaintiff newspapers are thus not entitled to any equitable relief whatsoever with regard to the Federal Statute which is the res of this action.[15]

8. These appellants, on the other hand, are entitled to equitable relief as against plaintiff newspapers, for their violations of the Federal Statute which is the chose in action, especially since a question of the civil rights of working women is involved (A 67)[16, 17]

9. The decision handed down in the instant case, since it is the first in a Federal Court concerning the "help-wanted" portion of the Civil Rights Act of 1964, will carry great weight as a precedent

14. 52 Am. Jur., Torts § 113, citing 93 U.S., 302, 23 L. Ed 863, 232 U. S. 571, 58 L. ed 733, 34 S. Ct. 370, Chirac v. Reinicker, 11 Wheat (U.S.) 288, followed many times, 86 CJS Torts § 43, 87 CJS Trespass § 31, 3 CJS Aider and Abettor § 505.
15. 27 Am. Jur 2d, Equity § 47, Queenan v. Mays, CCA Okla, 90 F 2d 525, certiorari denied, Board of Commissioners of Creek County, Okla. v. Mays, 58 S. Ct. 45, 302 U.S. 724, 82 L. ed 559
16. West Virginia State Board of Education v. Bernette, 319 U.S. 624, 87 L. ed 1628, 63 S. Ct. 1178
17. International News Service v. Associated Press, 248 U.S. 215, 6 L. Ed. 211, 39 S. Ct. 68, 2 A.L.R. 293

(A 99) [18]

As the Court observed in Nuesse v. Camp [19]:

> (12-13)...we may expect that a decision by the District Court here, the first judicial treatment of this question, would receive great weight...

10. There is already great public confusion as to the status and lack of conformity and enforcement surrounding the help-wanted provisions of the Civil Rights Act of 1964, as is illustrated by the following quotation from an editorial in the Chicago Journalism Review, entitled "Papers Defy Law & Order":

> If campus demonstrators get away with breaking even one law, the very fabric of the nation's social order is threatened. Or so we are told, with regularity, by Chicago's four major daily newspapers.
>
> Swift punishment is required, their editorials tell us. How else can we maintain respect for Law and Order. Professors and others who support illegal acts are deemed equally guilty of encouraging disrespect for L & O.
>
> But these same newspapers are openly violating the spirit, if not the letter, of another set of laws. At the very least, they are encouraging and facilitating widespread civil disobedience.
>
> The laws in question—guidelines from the U.S. Equal Employment Opportunity Commission--flatly forbid the listing of Help Wanted advertisements under separate male and female column headings "unless sex is a bona fide occupational qualification for the particular job involved."
>
> The guidelines, upheld January 24 by the U. S. Circuit Court of Appeals for the District of Columbia state that:

18. Textile Workers Union v. Allendale Co., supra, Nuesse v. Camp, 385 F. 2d 694 (1967), 128 U. S. App. D. C. 172
19. Nuesse v. Camp, 385 F. 2d 694, 128 U. S. App. D. C. 172 (1967)

"...placement of an advertisement in columns classified by publishers on the basis of sex, such as columns headed 'Male' or 'Female' will be considered an expression of a preference, limitation, specification, or discrimination based on sex."

Every day in Chicago, and in every other city with newspapers, this guideline is violated with the open and active encouragement of the publishers. All four Chicago downtown dailies run columns headed "Help Wanted--Men" and "Help Wanted--Women."

The newspapers try to explain it away by advising their readers that the column headings don't really mean what they say--that they are merely convenient labels, not rigid classifications. But the U. S. Circuit Court of Appeals doesn't think so. And unless and until the Supreme Court acts, the Circuit Court ruling is the "law of the land."

So what can be done about those who so arrogantly defy the American Way?

"We aren't empowered to initiate complaints," said the local EEOC staff aide. "But we will process complaints brought by others."[20]

11. A decision which does not take into its purview the actual practicalities of the help-wanted matter will tend still further to confuse the public, the parties to subsequent litigation, and the courts, particularly since interpretations of the court's rulings will ordinarily reach the public through the medium of these same newspapers. The public impression may very well be that the newspapers have come to court with the help-wanted issue, and have "come out clean". This might well constitute a stripping of the rights of working women, a constitutional civil rights issue, under the Civil Rights Act of 1964.

12. If the case is limited to the narrow technical issue to

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20. "Papers Defy Law and Order" Chicago Journalism Review, Volume 2, Number 3, March, 1969, 5000 S. Dorchester Avenue, Chicago, Illinois, 60615

which it has been reduced (A 81, point 3), the question as to whether the mere existence of the Guideline injures plaintiff newspapers, the trial of the case will be a virtually meaningless exercise of the Court's power. (A 71) In passing, it might be observed that pecuniary loss has seldom been upheld as an excuse for violating a law.

13. Working women, the intended beneficiaries of this Federal Statute, will thus be forced to seek their rights on a case-by-case basis. The hazards of this course are mentioned by Richard K. Berg, formerly Deputy General Counsel and Acting General Counsel for the Equal Employment Opportunity Commission, in an article entitled "Title VII, A Three-Years' View", appearing in the Notre Dame Lawyer:

> It is convenient to discuss the judicial decisions on the subject (of sex discrimination in the courts) separately, because in interpreting the content of the prohibition against sex discrimination the Commission and the courts have been almost completely oblivious of each other's decisions.[21]

Furthermore, since suing one's prospective employer is ordinarily not the best way of ingratiating oneself with him, this is obviously an impractical approach; many meritorious actions simply will not be filed, and mass injustices to the individual women who are precluded from job advancement will occur, all in direct contravention of the intent of Congress, and the provisions of Title VII.

14. While in many instances these cases will be technically well-founded, their costs, delays, problems of proof, and the like, will also deter many rightful causes of action, all to the irreparable

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21. "Title VII; A Three-Years' View," by Richard K. Berg, Notre Dame Lawyer, February, 1969, page 339

injury of the working women of this nation, the intended beneficiaries of the provisions of Title VIIwho will be stripped of their rights.

15. Evidence of the disparity in salaries and opportunity of the jobs offered in the "female" as versus the "male" classified columns could be shown, under a broadened consideration of this chose in action. This disparity, however, is projected into comparative income figures for women as compared with men, which have already been compiled, and which are illustrative of the desperate economic hardship of the working women of this nation under this differential:

> Although working full time and year-round, 54.1% or well over half, of the negro working women who head their families, are living at or below poverty level.[22]

In an era of increasing rebellion against "the welfare" load, this is a statistic of considerable import.

The last census also showed the following almost unbelievable median income figure for "white women with from one to five years college" the annual amount of $3,333.[23] It might be noted that income taxes payable on this amount, including surtax, are $423.50. In passing, we might note that the issues involved here are inextricably intertwined with the discontent and rebellion of these lower-paid workers.

> Women are not only concentrated in the lower level jobs, but are paid relatively less than men for comparable work. The median income of year-round full-time workers in 1966 was: Men $6,848, women $3,973[24]

22. United States Department of Commerce, Bureau of the Census, CPR 60, No. 55
23. Consumer Income, Series P-60, No. 47, Sept. 24, 1965, pp 93,40, U. S. Bureau of Census. (their figure for negro women of corresponding education is $3,602)
24. Remarks by Commissioner Elizabeth J. Kuck of the Equal Employment Opportunity Commission before the Commerce and Labor Committee of the Ohio House of Representatives, Columbus, Ohio, June 11, 1969

> Many women hold jobs which are far below their training and talent. In 1968 approximately one-fifth of women workers who had completed four years of college were non-professional; employed in clerical, sales, service worker or semi-skilled operative categories [25]

> In 1966, less than 1% of women earned salaries of $10,000 or more; the proportion for men was almost 20 times greater.[26]

When a woman does occasionally get a well-paid and responsible job, her feat is publicized in somewhat the manner of a sweepstakes winner, probably because the odds are somewhat similar, which makes the matter "news".

The impact of race discrimination in the job market has been acknowledged. Therefore it is interesting to note that more individuals are affected by sex discrimination:

> There were more white women working full-time the year round than all Negro men and women working full and part time combined. White women outnumbered Negroes of both sexes in the lowest income brackets. (italics ours) Five million white women worked full-time for less than $3,859 in 1964.[27]

The first Negro woman to be elected to the Congress of the United States has made a somewhat ironic observation on this point:

> More than half of the population of the United States is female. But women occupy only 2% of the managerial positions. They have not even reached tokenism.[28]

The impact of the salary of the working wife in raising the family from poverty level has been the subject of many studies:

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25. Remarks by Commissioner Kuck, supra
26. Ibid.
27. Caroline Bird, Born Female, The High Cost of Keeping Women Down, David McKay Company, Inc., New York (1968)
28. Statement by Congresswoman Shirley Chisholm, Congressional Record of May 21, 1969

> Nearly half of all women 18 to 64 years of age work in any one month. It is often the wife's earnings that raise family income above poverty levels.[29]

16. WEAL, the appellants herein, who are the movants to intervene in behalf of working women as a class, therefore are so situated that the disposition of this action may as a practical matter impair or impede their ability to protect that interest (A 70,99).

The Court stated in Nuesse v. Camp, as follows, concerning the interpretation of the revised Rule 24 (a) and (b) Fed. Rul. Civ. Proc.:

> The Rule now specifies only that the 'disposition of the action may as a practical matter impair or impede his ability to protect' the appellant's interest. This alteration is obviously designed to liberalize the right to intervene in federal actions.[30]

WEAL, the appellants herein, do not believe that the interest of working women is adequately represented by the Commission, since the equitable injuries suffered by WEAL, and by the working women we seek to represent, far outstrip, in nature and magnitude the interests of the Commission; the Commission has not introduced the issue of the failure of the newspapers to conform with the Guideline in question, or of the concommitant losses to working women, as a balance of equities. (A 16-37) WEAL can thus interpose a stronger equitable defense and counterclaim as against the newspapers with regard to help wanted advertising.

As the parties suffering the actual injury, we believe we will present a more vigorous defense in our own behalf.

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29. U. S. Department of Labor, Wage and Labor Standards Administration, Women's Bureau, W.B. 69,63 for November, 1968
30. Nuesse v. Camp, supra

As Judge Bazelon stated in the Textile Workers Union case, previously cited:

> (5) The right of the appellants to intervene is not affected by the fact that the general position they assert is already represented in the action by the Secretary of Labor...Even if the Secretary espoused the appellants' interests with greater heart, it would not necessarily preclude their appearance to plead for themselves.[31]

It should be noted that this observation was made in 1955, even prior to the liberalization of the rules on intervention in 1966, as reflected in the decision in the Nuesse case.

18. In any event, many pressures[32], factual disabilities[33] (A 10, 102) and inhibitions[34] tend to hamper a government agency in forcefully defending an action of this kind, and WEAL, the appellants herein, therefore do not believe that they are adequately represented by the Commission in this action.

19. The 1966 Revision of Rule 24 of the Federal Rules of Civil Procedure [35] has been interpreted as broadening the grounds for

31. Textile Workers Union v. Allendale, supra
32. "Dirksen sees Filibuster on Employment Bill, Cong. Report, Washington Post, May 22, 1968, "Mrs. Nixon: We're Already Equal'" Washington Post, June 18, 1969. Sen. Dirksen to Mr. Alexander, head of EEOC "this punitive harrassment has got to stop", editorial page, The New York Times March 28, 1969
33. "EEOC Chairman tells Congress of Limitations" The New Courier (N.Y.) June 7, 1969, Page 5
34. "Havoc Seen in Neuter Help Wanted Ads" A Report on a speech by Dr. Luther Holcomb Commissioner of the Equal Employment Opportunity Commission in which he strongly condemned the Guideline which is the res of this action, in a public speech, after the Guideline had been reinstated. Sunday Herald Traveler (Mass) Section one, page 98, November 17, 1968. Dr. Holcomb has since been reappointed to the Commission.
35. Rule 24 Fed. Rul. Civ. Proc. (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

intervention in the case of Nuesse v. Camp, supra, which appellants WEAL cited extensively in their Supplementary Brief in pages 95 through 104 in this Appendix [36], since these appellants believe that the Nuesse case is very similar, in its facts and issues, to the case at hand. In the Nuesse case Judge Leventhal reversed a Federal District Court decision, and ruled that intervention as of right should be permitted under the revised rules "when inter alia applicant claims an interest relating to the property or transaction which is the subject of the action." The Nuesse case was concerned with construction of a Federal Statute; the case was the first in its area of law; elements of public interest were involved, with "interests in a competitive system" at stake; and the representation by existing parties was an issue. All these elements are present in the instant case, but in this case the equity plea of the newspapers would still more properly open the door to evidence of the economic losses of working women, as an equity defense, and counterclaim.

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense on any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

36. Also cited were Toles v. U. S. 371 F. 2d 784 (10th Cir. 1967), Cascade National Gas Corp. v. El Paso National Gas Co., 386 U.S. 129, 135, 87 S. Ct. 932, 17 L. Ed 2d 814 (1967) reversing United States v. El Paso National Gas Co., 37 F. R. D. 330, (D. Utah 1965), Atlantis Development Corp. v. U. S., 379 F. 2d, 818, 5th Cir., June 12, 1967, Textile Workers Union v. Allendale Co., supra, and an article from the Harvard Law Review by David L. Shapiro, supra.

The Nuesse case involved the public interest insofar as banking regulations were concerned, but the public interests in the present case are far more pervasive in our economic structure, and involve economic injuries of far greater magnitude.

Rights of interested parties to intervene have also been greatly liberalized in a class of cases closely analogous to the case at hand: these are the hearings before boards or commissions involving licensing or authorizing enterprises under federal control, where private individuals assert an interest in the action.

Such a case is that of the United Church of Christ v. Federal Communications Commission[37], where the Court held that the Commission should allow intervention by one or more of the interested parties seeking intervention as "responsible representatives of the listening public" and observed that "the listeners are the most directly concerned with and ultimately affected by the performance of a broadcast licensee."

This has forceful analogy to the instant case, where working women are "the most directly concerned with and ultimately affected by" the performance of the newspapers in their help-wanted columns.

Other cases of this kind, where intervention has been liberally allowed in the public interest, are those involving airlines[38] and other utilities [39] whose activities impinge on the rights of individuals.

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37. United Church of Christ v. Federal Communications Commission, 123 U. S. App D. C. 328, 359 F. 2d 994 (1966)
38. City of San Antonio, Texas v. Civil Aeronautics Board, 374 F. 2d, 326, (1967); City of Houston, Texas v. Civil Aeronautics Board, 115 U. S. App. 115, 317 F. 2d 158 (1963) and Seaboard and Western Airlines v. Civil Aeronautics Board, 86 U. S. App. D. C. 64, 181 F. 2d 515 (1949)
39. Baltimore and Ohio Railway Company v. United States 386 U.S. 372, 426

In his analysis of the trend in permitting intervention, in the Yale Law Journal [40] Prof. Reich remarks that the Scenic Hudson [41] and the United Church of Christ cases are based on the principle that outside parties must be afforded standing in order that certain points of view be represented, where it becomes clear that the agency cannot adequately represent such points of view." [42] (italics ours)

At stake are the fundamental democratic rights of the citizenry. And the trend is to allow "responsible representatives of the public, however injured, the right to intervene as full parties in, and to appeal from" administrative actions.[43] This trend has been observable even in cases where no economic loss was claimed, as in the United Church of Christ, Scenic Hudson [44], and Sierra Club[45] interventions.

In the instant case, we need hardly point out, working women have a pressing and inescapable economic interest in the form of a "hurdle" not of their own making, which causes them irreparable injury in their search for suitable employment.

The trend to permit more liberal intervention in cases of public interest had its beginning in the case of Federal Communications Commission v. Sanders Bros. Radio Station [46], where the Supreme Court

40. Reich, "The Law of the Planned Society", 75 Yale Law Journal, 1227, 1248, (1966)
41. Scenic Hudson Preservation Conf. v. Federal Power Commission, 354 F. 2d 608, 619,620,621 (1965) cert. den. 384 U. S. 941
42. See Cascade Natural Gas Corp., supra
43. Reich, "The Law of the Planned Society" supra
44. Scenic Hudson Preservation Conv. v. Federal Power Commission, supra
45. Sierra Club, a non-profit corp. v. Hickel et al, U. S. Dist. Ct. Northern Dist. California, filed June 5, 1969 (Dept. Interior)
46. Federal Communications Commission v. Sanders Bros. Radio Station, 309 U. S. 470, 60 S. Ct. 693, 84 L. Ed 869 (1940)

held that persons claiming a potential economic injury rather than a legally protected right (italics ours) should be allowed to intervene in agency proceedings.

The case at hand is not an agency proceeding, but a challenge to an agency ruling, where the equity vulnerability of the plaintiff newspapers gives justice a unique opportunity to fulfill its function of correcting an iniquitous and inequitable situation, which will otherwise involve long and difficult litigation, the passage of ordinances, and other action, to correct.

The situation is similar to that in the Scenic Hudson case, in which the Court stated: "Representation of common interests by a responsible organization serves to limit the number of those who might otherwise apply for intervention, and serves to expedite the administrative process." [47]

In another case, not yet reported, that of the District of Columbia Federation of Civil Associations, Inc. v. Airis, [48] this Court held that private citizen action should be upheld where it is available.

Such assistance is not always offered to assist the Courts in administering justice, because, as the Court in the Scenic Hudson case observed, in favoring the right of intervention: "Our experience with public actions confirms the view that the expense and vexation of legal proceedings is not lightly undertaken."

We trust that it is not too self-serving or unwarranted to point out that in the instant case, the plaintiff newspapers are a powerful and heavily funded organization, representing a medium purpor-

47. Scenic Hudson, supra., also citing Virginia Petroleum Jobbers v. Federal Power Commission, 105 U.S. App D.C. 172, 265 F. 2d 364 (1959)
48. Not yet reported, No. 21,416, particularly note 29

tedly dedicated to serving the public interests; a government Commission which is tax supported, but which has in the past been somewhat laggard in the area of help-wanted advertising [49], as contrasted with these appellants, WEAL. We are a small organization, hardly six months old, and we have come into this action as the only agency volunteering to represent working women, the private citizens whose interests are being invaded.

An unorthodox situation, that of the flouting and evading of the intent of Congress[50] and the provisions of a Federal Statute [51] by what might be termed subterfuge[52] on the part of plaintiff newspapers who now stand before the Court, leads us to the unorthodoxy of quoting a rather unusual authority.

To point out that the situation surrounding the help-wanted advertising issue is explosive, especially among young people, I wish to quote a few portions of Voice of the Women's Liberation Movement,[53] apparently a student publication, which has come into our hands:

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49. Speech by Martha Griffiths, Congresswoman, Congressional Record, supra (page 1) "I charge that the officials of the Equal Employment Opportunity Commission have displayed a wholly negative attitude toward the sex provisions of Title VII. I would remind them that they took an oath to uphold the law--not just the part of it they are interested in."
50. Ibid. Page 1: "They disregard the fact that the Congress by enacting Title VII declared a national policy against discrimination in employment because of sex" (at page 4) "It is Congress, not the classified ad managers of newspapers that write our nation's laws." (italics ours) (page 3) "If it is unlawful to have ads in separate lists based on race then it is equally unlawful to have ads in separate lists based on sex."..."It is only because the EEOC fails to enforce the law that the individual advertiser is able to select a sex-labeled heading under which the ad will appear."
51. Section 704 (b) of Title VII of the Civil Rights Act of 1964, supra.
52. Papers Defy Law & Order, Chicago Journalism Review, supra.
53. Voice of the Women's Liberation Movement (editorial) 2623 Southport, Chicago, Illinois.

(headline) Women, Know the Facts!

Change means a disturbing, a threatening of the status quo, a status quo not good enough for us. After all, women's liberation is not just a hip substitute for (deletion) women's gatherings. We are not just in it once again to do our dilletante thing, to prove to our husbands and boyfriends that 'we have our political interests and activities too.' This will be a real struggle. And struggle is pain. We wouldn't do it if we didn't have to. (page 1)

* * * * *

Women with college degrees earn about as much as men with high school educations. When male-female educational levels are equal, men earn nearly twice as much. And, the wage gap between men and women has been steadily increasing for 25 years. Men are even taking over women's jobs while systematically denying them the right to hold 'masculine' jobs. For example, men are now becoming social workers and teachers and librarians, but women find it almost impossible to enter the professions. 29 million women work, and two-thirds of them have dull, menial jobs. 10% of all working women are heads of households and 40% of all working women are single, divorced, widowed, separated or deserted. Not one of these women is working for pin money, glamor or excitement. They're working because they have no other alternative! (page 13)

Lastly, and more ominously, note the following, to which a full page, with illustration, was devoted:

(Headline) World Women's Congress to be Held

Valentina Nikolayeva-Tereshkova, chairman of the Soviet Women's Committee has announced that large-scale preparations are under way in the Soviet Union for the World Women's Congress to be held in Helsinki next summer. Mrs. Tereshkova reported that over 90 countries and twelve international organizations have expressed a desire to attend the Congress which is sponsored by the International Women's Democratic Federation. The theme of the Congress will be women's role in the present-day world.

Soviet women have prepared a report entitled "Women and Work". Mrs. Tereshkova stressed the importance of this theme. Although one-third of all those working in the

> world are women, they still do not get equal pay for their work in a number of countries, she said. In many countries conditions have not been established to enable women to combine work and family duties.
>
> Valentina Nikolayeva Tereshkova expressed confidence that the World Women's Congress will demonstrate solidarity with heroic Vietnam. During preparations for the Congress, Soviet women are giving material help to the women of Vietnam, as well as to African Countries fighting for national independence. (page 14)

As an attack on the soft underbelly of the American Way, this approach could hardly be surpassed. It would seem to be high time that we put our own house in order if the present situation makes our young women vulnerable to the idea that Russia will have to "show us the way."

We present this material to show that we are dealing with a bottled-up injustice, and an explosive situation, that warrants the Courts' bending a bit, if possible, to clarify a situation which is so blatant as to arouse great bitterness among all working women, not just the younger ones. These pressures certainly present a "clear and present danger."

If corrections cannot be made through orderly, established channels, and made very soon, by "responsible" individuals, the needed changes will come about in less desirable ways, apparently.

It is worth noting, in passing, that the newspapers have had the power to edit out or to distort the evidences of pressures by working women for economic equality, and that they have, in most instances, availed themselves of this power. This is a manifestation to young people of what they consider a naked use of power by "the establishment" as is the continued flouting of the help-wanted regulations. The picketing of newspapers across the country is an evidence of this, as

is the previously-quoted article "Papers Defy Law and Order".

The hypocrisy of the newspapers in the help-wanted matter is having a detrimental effect on the attitudes of our young people toward established institutions. The outcome of this case will have an impact on their attitude toward the judicial processes.

WEAL, through the caliber of the men and women who comprise its membership, probably represents the opposite end of the spectrum from the student activists, but the ferment and dissatisfaction of working women is the same throughout.

It would seem to us, therefore, that if the courts could, in this and similar instances, adapt their processes to the exigencies of the situation, the public interest would be served.

CONCLUSION

For the foregoing reasons appellants WEAL respectfully pray that the Order of the District Court, insofar as it denies to these appellants the right to intervene in behalf of working women, be reversed; that the District Court be instructed that it erred in construing the standards of its Rule 24 (a) and (b) Fed. Rul. Civ. Proc. to deny intervention to these appellants, and to require them to rely upon the Commission to represent their interests; that WEAL be allowed to intervene as of right under the provisions of Rule 24 (a) Fed.Rul. Civ. Proc.; and that the District Court be instructed that the equity issues which WEAL seeks to raise are required considerations in this action in view of the magnitude of the public interests involved.

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BRIEF FOR APPELLEES

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23316

AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION
and THE EVENING STAR NEWSPAPER COMPANY

v.

CLIFFORD L. ALEXANDER, *et al.*, as Members of the Equal Employment Opportunity Commission

and

WOMEN'S EQUITY ACTION LEAGUE, *Appellant*

Appeal From an Order of the United States District Court for the District of Columbia

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2. Whether the Court below abused its discretion in denying permissive intervention under Rule 24(b), F.R. Civ. P. to applicant, where it appears from the pleadings that applicant only seeks to enlarge the issues embraced by the main actions and thereby create purported questions of law or fact somehow common to those involved in the main action.

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BRIEF FOR APPELLEES

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the District of Columbia denying a motion filed by the Women's Equity Action League to intervene in the main action of this suit.

On October 25, 1968, the American Newspaper Publishers Association and The Evening Star Newspaper Company filed below their first amended complaint against the Commissioners of the Equal Employment Opportunity Commission seeking, *inter alia*, a preliminary and permanent injunction restraining the Commissioners from enforcing the purported GUIDELINES ON DISCRIMINATION BECAUSE OF SEX, published at 33 Fed. Reg. 11539 (August 14, 1968). The thrust of that litigation is that the Commissioners had exceeded their statutory authority in promulgating what was characterized as a "guideline" but what was in actuality a regulation which was beyond the Commissioners' authority delineated by Congress in the Civil Rights Act of 1964. The ANPA and Star subsequently appealed the District Court's denial of their motion for a preliminary injunction, and in connection with that appeal obtained from the District Court a stay of the effective date of the guideline pending appeal. This Court, in a *per curiam* opinion, upheld the District Court's denial of the ANPA's and Star's motion for a preliminary injunction, vacated the stay order, and remanded the case for "prompt prosecution of the case on the merits."[1]

The Women's Equity Action League, operating under the acronym WEAL, filed a motion to intervene as a party-defendant in the instant litigation on March 27, 1969, citing as its alternative grounds to so intervene the provisions of Rule 24(a)(b), F.R. Civ. P., and the general equity jurisdiction of the District Court. The proposed answer, attached to the League's motion to intervene, contained a cross-complaint wherein the League prayed that the District Court enjoin the Association and the Star from accepting paid advertising classified under "male" and "female" column headings, and that the District Court enjoin the ANPA and the Star in their capacity as alleged agents

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[1] *American Newspaper Publishers Association, et al.* v. *Alexander, et al.*, No. 22,519, p. 3 (D. C. Cir. January 29, 1969).

of employer-advertisers and in their capacity as employers from violation of Title VII of the Civil Rights Act of 1964.

After consideration of the League's motion to intervene, the ANPA's and the Star's opposition thereto, and oral argument of counsel, the assistant pre-trial examiner, Elizabeth Bunten, on May 1, 1969, recommended that the said motion of the League to intervene and file a cross-claim in this litigation be denied. (App. 81)

Subsequently, the League, on May 6, 1969, filed its objection to the recommendation of the pre-trial examiner. Upon consideration of the points and authorities filed by the ANPA, the Star, and the League, and having heard argument by counsel for the respective parties, the District Court adopted the recommendation of the pre-trial examiner and on June 4, 1969, ordered that the said motion be denied. (App. 105). It is from this order that the instant appeal has been taken.

SUMMARY OF ARGUMENT

Rule 24(a), Federal Rules of Civil Procedure, provides that an applicant shall be permitted to intervene in an action where it claims an interest relating to the subject of the action, and it is so situated that disposition of the action may as a practical matter impair or impede its ability to protect that interest; and that the applicant's interest is inadequately represented by the existing parties.

It is clear that the Women's Equity Action League has no right under this section of the Rule to intervene because it seeks to expand the issues presently under consideration by the District Court. The present litigation embraces the question of whether the Commissioners have exceeded their statutory authority in promulgating the contested GUIDELINES ON DISCRIMINATION BECAUSE OF SEX. The League does not seek to participate in that issue, but instead seeks to enlarge the litigation to embrace

the question or whether newspapers are complying with Section 704(b) of the Civil Rights Act of 1964. Not only is this section not directed to newspapers, but expansion of the issues in a main action to create an interest in the applicant for intervention is not permitted or contemplated by Rule 24(a).

It is also clear that the court below did not abuse its discretion in denying permissive intervention under Rule 24(b), Federal Rules of Civil Procedure. The applicant's claim or defense has no question of law or fact which is common with the ones embraced by the main action. The main action involves subtle questions of administrative law involving the statutory authority of the Commission to promulgate the contested guideline in the manner and form it did. The League ignores that issue and attempts to inject into the main action the question of whether the newspapers are complying with Title VII of the Civil Rights Act of 1964. We respectfully submit that the District Court correctly exercised its discretion in denying intervention under this section of the Rule so that the issues would not be unnecessarily confused by the League's proffered defense and cross-claim.

ARGUMENT

The Court Correctly Denied Intervention as of Right Under Rule 24(a), F.R. Civ. P. to the Applicant, It Being Apparent From the Pleadings That Applicant Sought to Enlarge the Issues Embraced by the Main Action and Thereby Create for Itself an Interest in the Litigation

The League sought to bring itself within the purview of Rule 24(a) by making sweeping declarations and vague statements in its pleadings below (App. 54-58) and its brief herein that without its participation, the "real issues" involved in the present litigation will not be reached and the equitable rights of the potential intervenor's members will somehow be ignored. It suggests that by filing a suit for equitable relief, the ANPA and the Star have somehow

"opened the door to equity" through which the League should be allowed to pass so that its "equitable rights" may be enforced.

Attorneys for the League quite candidly admitted that through their intervention they sought to broaden the issues before the District Court:

> The Court: Well, the case before the Court, as I recall it—I frankly haven't had the opportunity to review the whole file—but the matter before the Court now, is the matter of the objection to the pre-trial examiner's recommendation and guidelines.
>
> Mrs. Boyer: No; we thought that in broadening that, as we, in a way, sought to do, we were seeking to defend the paragraph 704(b) to the greatest extent it could be defended in that we have our own equitable interests.
>
> The Court: You are interjecting new issues into the case. You are getting beyond the mere power of the Commissioner. If they promulgate guidelines, you are saying if they do have the power, they are going to have to do it our way. That's what you are saying. (App. Z-3).

The issue involved in the main action involves the statutory authority of the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964, to promulgate the contested guideline in the manner and form which was utilized. The question does not involve Section 704(b) of the Civil Rights Act of 1964, as the League has asserted, or, as an abstract question, whether placing a help-wanted advertisement under columns classified by the publishers "male" or "female" or "male-female" violates Section 704(b). Instead, the question of law presented to the Court by the ANPA and the Star embraces subtle questions of administrative procedure which do not involve and do not affect either the League or its members, *i.e.*, whether the Commission has the statutory authority under Title VII to promulgate the "guideline" in question.

In short, it is apparent that the League seeks to enlarge the issues embraced by the present litigation so as to bring itself within the case and thereby create an interest in the litigation. It is submitted that such action is not permitted by Rule 24(a). See, *e.g.*, *In re Willacy County Water Control & Improvement District No. 1*, 26 F. Supp. 36 (S.D. Tex. 1940); *Salem Engineering Co.* v. *National Supply Co.*, 75 F. Supp. 933 (W.D. Pa. 1948).

For example, in discussing this precise issue of expansion of the issues in the main action to bring the applicant within the purview of the case, the Court in *Slusarski* v. *United States Lines Co.*, 28 F.R.D. 388 (E.D. Pa. 1961) announced:

> the rule is well settled that an intervention introducing litigation having no relation to that opened by the original complaint will not be permitted. *Id.* at 390.

Moreover, the issue which the League seeks to inject into the present litigation is not embraced by Title VII of the Civil Rights Act of 1964. Appellant seeks to cross-claim for an injunction commanding the Association and the Star to comply with the provisions of Section 704(b) of the Act, 42 U.S.C. § 2000e-3(b). That section reads as follows:

> It shall be an unlawful employment practice for an employer, labor organization, or employment agency to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on religion, sex, or nationl origin when religion, sex, or national origin is a bona fide occupational qualification for employment.

That Section, however, is not directed to publishers in their function of publishing help-wanted advertisements in their newspapers.[2] It is directed only to employers, employment agencies and labor unions. Insofar as their actions as employers are concerned, there clearly is no basis for injunctive relief against the parties here. There is no specific allegation of a discriminatory act on the part of any appellee as an "employer". Nor is there any allegation that appellants have attempted to exhaust their state or federal administrative remedies as required by Section 706(a), (b) or (e) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(a), (b) or (e) (1964). Moreover, no dates are alleged in the motion or cross-complaint so that the applicant's timeliness of asserting whatever rights it possesses under Title VII can be measured against the time limitations set out in Section 706. *Fore* v. *Southern Bell Telephone & Telegraph Co.*, 59 Lab. Cas. ¶ 9173 (W. D.N.C. 1968). The Fourth Circuit stated in *Stebbins* v. *Nationwide Mutual Insurance Co.*, 382 F.2d 267 (4th Cir. 1967):

> Having reviewed the legislative history of the Act, as well as its language, we agree with the District Judge that the plaintiff could not bypass the federal agency and apply directly to the courts for relief. Congress established comprehensive and detailed procedures to afford the EEOC the *opportunity* to attempt by administrative action to conciliate and mediate unlawful employment practices with a view to obtaining voluntary compliance. The plaintiff must therefore seek his administrative remedies before instituting court action against the alleged discriminator. *Id.* at 268. (Emphasis in original).

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[2] In fact, the report of the House Judiciary Committee stresses that Section 704(b) does not require newspapers and other publications to exercise any control or supervision over, or to do any screening of, the advertisements and notices published by them. H.R. Rep. No. 914, 88th Cong., 1st Sess. 28 (1963).

The League principally relies on *Nuesse* v. *Camp*, 128 U.S. App. D.C. 172, 385 F.2d 694 (1967) decided by this Court and involving the ramifications of Rule 24. That case involved an action by a Wisconsin bank for declaratory and injunctive relief against the United States Comptroller of Currency who allegedly was about to unlawfully approve an application of a national bank to open a branch bank in the vicinity of the state bank's office. The Comptroller had authority under the United States Code to approve such application only if state banks under state law were permitted to operate branches. This Court declared that the State Banking Commissioner had an interest in the litigation and was entitled to intervene as of right because state policy was directly involved in the litigation. Additionally, because of the doctrine of *stare decisis*, and because the main litigation presented a question of first impression, the disposition of the main action would impair the Commissioner's ability to protect that interest.

It is clear, however, that none of the elements present in *Nuesse* is present in this litigation. Unlike the appellant in this appeal, the State Commissioner did not seek enlargement of the issues to create his interest in the main action. His interest therein was pre-existing.

In addition, it is apparent from a glance at its pleadings in the record that the League has failed to show that the present parties inadequately represent the interests of the League's members, even assuming that those members have an interest in the litigation. The underlying requirement of Rule 24(a) is a showing that the present parties do not adequately represent the interests of the intervenors. Upon the intervenors' failure to make such a showing, the motion was properly denied below. See, *e.g.*, *Kozak* v. *Wells*, 278 F.2d 104 (8th Cir. 1960), and Barron & Holtzoff, *Federal Practice and Procedure* § 597 (1961).

The District Court Did Not Abuse Its Discretion in Denying Permissive Intervention Under Rule 24(b), F.R. Civ. P.

Rule 24(b), providing for permissive intervention, requires that the applicant's defense and the main action have common questions of law or fact. As hereinbefore set forth, the question of law in the main action involves the statutory authority of the Commission under Title VII to promulgate the guideline on discrimination because of sex in the manner and form which it was utilized. Again, it is clear that the court below did not abuse its discretion in denying the League's motion under this section inasmuch as the League sought to enlarge the issues embraced by the main action so as to bring itself within the case.

CONCLUSION

For the reasons stated here, the American Newspaper Publishers Association and The Evening Star Newspaper Company pray that this Court affirm the District Court's order denying the motion of the Women's Equity Action League to intervene in this litigation.

Respectfully submitted,

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